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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD MALLEY and THE STATE OF RHODE ISLAND,
Petitioners,

vs.

JAMES R. BRIGGS and LOUISA BRIGGS,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is a law enforcement officer's submission of a truthful and complete warrant application to a neutral and detached judge for a probable cause determination objectively reasonable, good faith conduct so that he has qualified immunity from liability for damages in a 42 U.S.C. § 1983 action for "constitutional negligence" even if the judge's probable cause determination is subsequently declared erroneous?

Did the First Circuit Court of Appeals err in assuming that there was no probable cause for submission of the application for warrant?

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INTEREST OF THE AMICUS CURIAE

The Attorney General of the State of Illinois shares the concern that an unwarranted and erroneous amplification of tort liability of police officers under 42 U.S.C. § 1983 will hinder vigorous and effective law enforcement. The State of Illinois as *amicus curiae* accordingly joins in the petition for writ of certiorari as well as in the briefs of the other *amici* in this cause and urges the Court to consider the following additional reasons for granting the petition.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PROVIDES AN OPPORTUNITY TO RESOLVE SIGNIFICANT QUESTIONS CONCERNING THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY OF A POLICE OFFICER IN A 42 U.S.C. § 1983 ACTION.

Just last Term this Court decided that the Fourth Amendment exclusionary rule should be relaxed to permit admission of evidence obtained by police officers acting in objectively reasonable reliance on a duly issued warrant, although that warrant was later found to be unsupported by probable cause. *United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The extent to which the same "good faith" concept may redefine qualified immunity of police officers from tort liability under 42 U.S.C. § 1983 is now unclear. However, *dicta* in *Leon* suggests that there may be a new correlative immunity from civil damages for actions undertaken in an objective good faith acquisition of a warrant. 104 S.Ct. at 3456, n.35, 82 L.Ed.2d at 734, n.35 (Stevens, J., dissenting).

The recent *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) decision also provokes a challenge to the traditional definition of officer immunity. Considering an immunity defense for policy-making government officials in that case, this Court approved an objective standard only, thereby rejecting the more subjective *Pierson v. Ray*, 386 U.S. 547 (1967) "good faith" immunity rule adopted from state tort law for police officers. However, this Court in *Harlow* did not have an opportunity to consider police officer immunity or the circumstance of the prior judicial authorization of official conduct embodied in a warrant.

Finally, this Court has twice suggested in recent years an interest in considering the problem of negligent deprivations of constitutional rights by law enforcement officials, but has been unable to do so in the past by the procedural posture presented. *Baker v. McCollan*, 443 U.S. 137 (1979) and *Procunier v. Navarette*, 434 U.S. 555 (1978). There are also the multiple separate opinions and present diversity of views expressed in *Parratt v. Taylor*, 451 U.S. 527 (1981), wherein a prison inmate unsuccessfully raised a procedural due process claim in an attempt to allege negligence of constitutional proportions.

Alternatively stated, there is no present rule concerning the appropriate standard of care for preventing a Fourth Amendment violation by a law enforcement officer. Because that is the issue squarely presented by the instant petition, it presents an opportunity in which to decide the vital issues raised by the *Leon*, *Harlow*, and *Baker* decisions. This petition considers the qualified immunity available to police officers in 42 U.S.C. § 1983 actions when the "constitutional negligence" of an officer, who has reasonably relied on a presumptively valid warrant, has been alleged.

II.

THE OBJECTIVE REASONABLENESS OF AN OFFICER'S CONDUCT IS DEMONSTRATED BY UTILIZATION OF THE WARRANT PROCEDURE.

No matter what the test by which an officer's duty of care to avoid negligent deprivations of constitutional rights is measured, it is highly significant that official action undertaken within the judicial process has been deemed *per se* reasonable in the exclusionary rule context. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978), citing *Katz v. United States*, 389 U.S. 347, 357 (1967) with approval, and *Illinois*

v. Gates, ____ U.S. ____, 103 S.Ct. 2317, 2358, n.9, 76 L.Ed.2d 527, 581, n.9 (1983) (Brennan and Marshall, JJ., dissenting). The warrant is considered *prima facie* proof of reasonable conduct (White, J., concurring), and the warrant accordingly provides a proper measure of protection in any subsequent action for damages. *United States v. Ross*, 456 U.S. 798, 823, n.32 (1982).

In this case then, *amicus curiae* suggests that if, as *Leon* implies, *Harlow v. Fitzgerald* provides the standard, the "objective reasonableness of an officer's conduct" for a *Harlow* qualified immunity is demonstrated in significant part by the decision of the officer to submit his information to a detached and neutral judge for independent review and a judicial determination of probable cause. The need to impose liability in tort when the officer "should have known" there was no probable cause is not applicable when the officer seeks a warrant and does not assume the risk of independent judgement.

III.

THE POLICE OFFICER HAD A SUFFICIENT BASIS TO GO TO A JUDGE FOR A DETERMINATION OF PROBABLE CAUSE FOR AN APPLICATION OF AN ARREST WARRANT.

In this case, there has been no state court or federal district court finding of an absence of probable cause for the Briggs warrant. Nonetheless, the First Circuit assumed the absence of probable cause, presumably based upon the fact of the "no bill" returned by the grand jury. The State of Illinois maintains that the return of the "no bill" does not mean as a matter of law that the police officer did not have enough information to go to the judge nor does it have any bearing whatsoever on the question of whether he was constitutionally negligent in going before the judge.

The determination of whether the officer had sufficient information to apply for a warrant depends on the facts of the individual case. In the case at bar, the officer went before the judge with an affidavit accurately referring to a police call log that identified plaintiffs by name and indicated by its terminology that plaintiffs were in possession of marijuana. The State of Illinois maintains that on these facts the question of the exercise of probable cause is at least debatable and, assuming the First Circuit's standard is correct, it falls within the grey area so that there would be no liability.

No court should declare that the police officer acted unreasonably under the Constitution when he took this question to the judge for decision. A ruling that the officer had enough probable cause to go to a judge is the correct one. Moreover, such a ruling would be desirable for several reasons. First, it would effectuate this Court's policy of encouraging law enforcement officials to use the warrant process. Second, it would avoid a ruling that would have the effect of deterring law enforcement officials from enthusiastically exercising their duties. Third, it would resolve the question at bar without any extension of tort liability to police officers under 42 U.S.C. § 1983.

CONCLUSION

This Court, as recently as the *Leon* and *Sheppard* decisions, has always encouraged police officers to utilize the warrant process to protect constitutional rights. Yet the unfortunate and ironic possibility presented here is that, if an officer's liability in tort is not reduced by the pro-

tection of a warrant duly issued by a judge, then the officer will likely resort to warrantless activity. The State of Illinois as *amicus curiae* respectfully urges this Court to grant *certiorari* to provide clarification of uncertain law and to extend authoritative guidance in this significant area of law enforcement.

Respectfully submitted,

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